

**Iowa Department of Natural Resources
Environmental Protection Commission**

ITEM

7

DECISION

TOPIC

**Final Rule, Chapter 61, Water Quality Standards, Section 401 Certification
of Section 404 Nationwide Permits (NWPs)**

Pursuant to the authority of Iowa Code sections 455B.105 and 455B.173, Commission approval is requested for the attached Final Rule that will amend Chapter 61: Water Quality Standards to provide Section 401 water quality certification for 49 Corps of Engineers Nationwide Permits. Section 401 water quality certification is a state water quality agency's certification that a proposed activity will not violate state water quality standards.

The Corps issued the final nationwide permits, general conditions, and definitions in the March 12, 2007 Federal Register. These nationwide permits, general conditions, regional conditions, and regional permits will become effective on March 19, 2007. The states are given 60 days (until May 11, 2007) to complete rule-making activities and provide water quality certification. A copy of the March 12, 2007 Federal Register with the final NWPs can be obtained from the Department of Natural Resources (DNR).

A public hearing was held on December 26, 2007. Two individuals representing the Iowa Chapter of the Sierra Club and the Iowa Environmental Council were present. Comments to the proposed rule changes were received both orally at the public hearing and in writing. The comments received ask the DNR to work with the Corps to provide the highest level of protection for Iowa's waterbodies as possible. The comments received are summarized in the attached Responsiveness Summary.

At the time the Notice of Intended Action was published, the Corps had not finalized the NWPs. The Corps adopted the NWP final rules on March 12, 2007 and some of the NWPs differ from the NWPs as originally proposed by the Corps. The six new nationwide permits will be numbered 45-50 (instead of A-F as they appeared in the September 26, 2006 Federal Register).

The preamble to the final rule addresses changes to Chapter 61 made as a result of the comments received from the Sierra Club and Iowa Environmental Council.

Charles Corell, Bureau Chief
Water Quality Bureau
March 12, 2007

ENVIRONMENTAL PROTECTION COMMISSION [567]

Adopted and Filed

Pursuant to the authority of Iowa Code sections 455B.105 and 455B.173, the Environmental Protection Commission hereby amends Chapter 61, “Water Quality Standards,” Iowa Administrative Code.

The amendment will provide water quality certification pursuant to Section 401 of the federal Clean Water Act (33 U.S.C. Section 1341) for 49 U.S. Army Corps of Engineers’ Nationwide Permits (NWPs) and three Regional Permits (RPs).

Section 404 of the Clean Water Act requires a permit from the Corps of Engineers (Corps) for the discharge of dredged or fill materials into the nation’s waters. Section 401 of the Act requires that before the Corps can issue a Section 404 permit, the state water quality agency must certify that the proposed activity will not violate state water quality standards.

Section 404 authorizes the Corps to issue general permits on a state, regional or nationwide basis for categories of activities when such activities will have minimal adverse effects. The Corps has used its general permit authority to issue a number of general permits on a nationwide basis (i.e., NWPs). General permits, including nationwide permits, may be issued for a period not exceeding five years, and a state water quality agency must provide Section 401 certification for a Section 404 general permit before the general permit is valid for that particular state. The Commission previously provided Section 401 certification for 43 NWPs and four regional permits. These permits are referenced in 61.2(2)“h.”

Notice of Intended Action was published in the December 6, 2006, Iowa Administrative Bulletin as ARC 5598B. A public hearing was held, and comments were received. A responsiveness summary was prepared addressing all comments received. The responsiveness summary is available from the Department of Natural Resources (DNR) and has been filed with the Administrative Code Editor.

The comments received were from individuals representing the Iowa chapter of the Sierra Club and the Iowa Environmental Council. They requested that the DNR work closely with the Corps to provide the highest possible level of protection possible for Iowa's water bodies. In response to comments received, changes to the proposed rules were made. Those changes are discussed below.

The adopted amendments differ from the amendments published in the Notice of Intended Action as follows:

In the March 12, 2007, Federal Register, the Corps changed nationwide permits "A-F" (as referenced in the September 26, 2006, Federal Register) to "45-50." Text in paragraph 61.2(2)"h" has been further amended to reflect this change.

The DNR is proposing to certify the nationwide permits, regional permits, and their respective conditions. Based on comments received, the DNR has added two state water quality conditions to paragraph 61.2(2)"h." The first condition requires an individual Section 401 Water Quality Certificate for any projects that impact fens, bogs, seeps, or sedge meadows. These wetlands are rare, often contain threatened or endangered species, and deserve extra protection and heightened review. The second condition requires an individual Section 401 Water Quality Certificate for nationwide permits when the Corps' district engineer has issued a waiver to allow the permittee to exceed the limits of the nationwide permit. Even though the Corps does not waive many

limits (the 2002 nationwide permits also had waiver provisions), the DNR would like to review these projects to make sure that they have only minimal impacts on Iowa's water bodies and they do not violate Iowa's water quality standards.

Additionally, one sentence in paragraph 61.2(2)"h" was changed to more accurately reflect the nationwide and regional permit processes.

This amendment will become effective on May 30, 2007.

This amendment is intended to implement Iowa Code chapter 455B, division III, part 1.

The following amendment is adopted.

Amend subrule **61.2(2)**, paragraph "**h**," as follows:

h. This policy shall be applied in conjunction with water quality certification review pursuant to Section 401 of the Act. In the event that activities are specifically exempted from flood plain development permits or any other permits issued by this department in 567—Chapters 70, 71, and 72, the activity will be considered consistent with this policy. Other activities not otherwise exempted will be subject to 567—Chapters 70, 71, and 72 and this policy. The repair and maintenance of a drainage district ditch as defined in 567—70.2(455B,481A) will not be considered a violation of the antidegradation policy for the purpose of implementing Title IV of these rules. United States Army Corps of Engineers (Corps) nationwide permits 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, ~~and~~ 44, 45, 46, 47, 48, 49, and 50 as well as Corps regional permits 7, 33, and 34 as

promulgated March ~~18, 2002~~ 19, 2007, are certified pursuant to Section 401 of the Clean Water Act subject to the following Corps regional conditions and the state water quality conditions:

(1) Side slopes of a newly constructed channel will be no steeper than 2:1 ~~horizontal to 1 vertical~~ and planted to permanent, perennial, native vegetation if ~~it is~~ not armored.

(2) Nationwide permits with mitigation may require recording of the nationwide permit and pertinent drawings with the registrar of deeds or other appropriate official charged with the responsibility for maintaining records of title to, or interest in, real property and that the permittee provide proof of that recording to the Corps.

(3) Mitigation shall be scheduled ~~for construction~~ prior to, or concurrent with, the ~~construction of the main project~~ discharge of dredged or fill material into waters of the United States. ~~Regional permit numbers 2, 7, 12, and 20 of the Rock Island District of the Corps are also certified.~~

(4) For discharges of dredged or fill material resulting in the permanent loss of more than 1/10 acre of waters of the United States (including jurisdictional wetlands), a compensatory mitigation plan to offset those losses will be required. In addition, a preconstruction notice to the Corps of Engineers in accordance with general condition 27 will be required.

(5) For newly constructed channels through areas that are unvegetated, native grass filter strips or a riparian buffer with native trees or shrubs a minimum of 35 feet wide from the top of bank must be planted along both sides of the new channel. A survival rate of 80 percent of desirable species shall be achieved within three years of establishment of the buffer strip.

(6) For single-family residences authorized under nationwide permit 29, the permanent loss of waters of the United States (including jurisdictional wetlands) must not exceed 1/4 acre.

(7) For nationwide permit 46, the discharge of dredged or fill material into ditches that would sever the jurisdiction of an upstream water of the United States from a downstream water of the United States is not allowed.

(8) (Iowa Section 401 Water Quality Certification condition) An individual Section 401 Water Quality Certification will be required for projects that impact fens, bogs, seeps, or sedge meadows.

(9) (Iowa Section 401 Water Quality Certification condition) An individual Section 401 Water Quality Certification will be required for nationwide permits where the Corps' district engineer has issued a waiver to allow the permittee to exceed the limits of the nationwide permit.

~~No specific~~ Written verification by the Corps permit or 401 certification by the state is required for activities covered by these permits ~~unless~~ as required by the nationwide permit or the Corps, and the activities are allowed subject to the terms and conditions of the nationwide and regional permits. The department will maintain and periodically update a guidance document listing special waters of concern. This document will be provided to the Corps for use in determining whether preconstruction notices should be provided to the department and other interested parties prior to taking action on applications for projects that would normally be covered by a nationwide or regional permit and not require preconstruction notice under ~~national~~ nationwide permit conditions.

PUBLIC PARTICIPATION RESPONSIVENESS SUMMARY

FOR

CHAPTER 61, WATER QUALITY STANDARDS

CORPS OF ENGINEERS' NATIONWIDE & REGIONAL PERMITS

DEPARTMENT OF NATURAL RESOURCES

ENVIRONMENTAL PROTECTION DIVISION

March 12, 2007

RESPONSIVENESS SUMMARY

The following is a summary of the comments received in response to the Environmental Protection Commission's water quality standards published in the Iowa Administrative Bulletin as ARC 5598B on December 6, 2006. The amendment as proposed would have provided Section 401 water quality certification for 49 new or reissued U.S. Army Corps of Engineers' Section 404 Nationwide Permits (NWP), three regional permits, and their respective conditions.

One public hearing was held on December 26, 2006 in Des Moines. Written and oral comments were received and a summary of those comments and the Department's recommendations are also provided.

The publication of the proposed amendments, the public hearing, and the close of the comment period occurred before the finalization of the Corps' NWP. Therefore, the comments received were relative to Section 401 certification for the NWP as originally proposed. The preamble to the Notice of Intended Action noted that the Corps had not finalized the NWP and indicated that the Environmental Protection Commission would not take final action on the proposed Section 401 certification of the NWP prior to the Corps' publication of the final NWP. The Corps published the final NWP in the Federal Register on March 12, 2007 and some of the NWP differ from the NWP as originally proposed. The discussion section following each comment notes the extent of any such changes relevant to the comments provided.

Comments and Discussion

Wallace Taylor, Iowa Chapter Sierra Club

Comment 1: The Department is seeking comment on proposed regional conditions based on the draft, not the finalized Nationwide Permits (NWP). The state should base its water quality certification review on the finalized NWP, since the permit limits and general conditions in those finalized NWP will be determinant of their effect on Iowa's waters. And the public should be afforded the opportunity to comment on conditions prepared on that basis.

Discussion: The certified nationwide and regional permits are referenced in Iowa rules (Chapter 61). The Corps reissues the NWP every five years. Every time the Corps reissues the NWP, Chapter 61 is also updated. The Corps of Engineers (Corps) published the proposed NWP in the September 26, 2006 Federal Register which prompted the beginning of Iowa's rule-making process. The final rules, if approved by the Environmental Protection Commission in their April meeting, will become effective on May 30, 2007. If Iowa waited until the final NWP were published, in this case on March 12, 2007, to begin rule-making activities, every NWP issued from March 19, 2007 until Chapter 61 changes were finalized many months later would all require individual 401 certification from the Department of Natural Resources. Iowa only has one full time employee to administer this program and would be overwhelmed if water quality certificates had to be issued for every individual, nationwide and regional permits issued by the Corps.

Due to the length of time it takes to make changes to our rules, we cannot wait for the final published NWP to begin the rule-making process. Over the years, the proposed NWPs have been close to the final published NWPs. The comments we receive for the proposed NWPs help us determine how to respond to the final NWPs.

Comment 2: Proposed State Regional Condition 1 would limit side slopes of newly constructed channels to a gradient no steeper than 2:1 and require that the slopes be planted in permanent, perennial, and native vegetation if not armored. Hard engineering techniques should, in fact, be discouraged altogether, rather than preferred. Streambank armoring has been shown to be associated with various negative effects on streams, including increasing stream velocity, degradation of the stream channel, loss of the ability of riparian areas to revegetate, loss of spawning habitat, and accelerated erosion downstream. Streambank stabilization should rely on bioengineering to the maximum extent possible, with specific limits on the extent to which rip rap may be used. Both New Jersey and New Hampshire have incorporated natural stream bank stabilization methods requirements into their regulations, which may serve as useful models for revising proposed Regional Condition 1.

Discussion: The Corps does not encourage the use of riprap over the use of vegetated streambanks. The purpose of this condition is to force the applicant to provide some type of streambank stabilization versus leaving bare soil to “naturally revegetate” as some applicants propose.

Comment 3: Proposed Regional Condition 2 regarding the recording of mitigation should be strengthened to ensure that all mitigation projects have instruments for permanent protection that are documented and recorded.

Discussion: The Corps requires the recording of the permits involving mitigation in all cases except when the mitigation site is located on County Conservation Board property or the applicant has proof they are giving the mitigation site to a county conservation board, the Natural Heritage Foundation, the DNR, etc. where the site will not be sold or converted to another land use. Therefore, we will not change the wording of this condition.

Comment 4: Proposed Regional Condition 3 requiring that mitigation be scheduled in advance or concurrent with permitted impacts is appropriate and we fully support it.

Discussion: We also support this condition and will not change the wording.

Comment 5: Proposed Regional Condition 4, requiring compensatory mitigation to offset impact of more than 1/10 acres of waters of the U.S., is an important safeguard, discouraging unnecessary filling of aquatic resources and ensuring that those resources are replaced. DNR

should specify that the compensatory mitigation must provide replacement that is at least as good in function and at least as large in area as wetland being lost .

Discussion: The Rock Island District of the Corps works with all applicants to provide the best mitigation plan for the resource being impacted. The Corps issued “Mitigation and Monitoring Guidelines” to provide guidance when designing mitigation sites. They encourage mitigation that is in-kind, on-site and will be monitored to confirm success. The mitigation sites must provide for no net loss of functions and values of the resource being impacted.

Comment 6: Proposed Regional Condition 5 provides for establishment of riparian buffers for stream channels that are constructed through areas that are not naturally vegetated. This condition would help to compensate for the Corps’ proposed removal of the requirement for buffering open waters that applies to several of the current NWP. We recommend that DNR expand this Regional Condition to require buffering of all open waters, not just newly constructed channels, for all the NWPs, but especially NWPs 29 and 39. In addition, the Condition should provide for long-term maintenance of the buffer. Too often trees or grasses and forbs are planted but do not survive.

Discussion: Based on Mr. Taylor’s comments, the Corps revised this condition to the following: “For newly constructed channels through areas that are unvegetated, native grass filter strips or a riparian buffer with native trees or shrubs a minimum of 35 feet wide from the top of bank must be planted along both sides of the new channel. A survival rate of 80 percent of desirable species shall be achieved within three years of establishment of the buffer strip.”

Comment 7: Proposed Regional Condition 6 would limit the permanent loss of waters from activities associated with construction of single-family residences under NWP 29 to ¼ acre. We are very concerned that the Corps has proposed to allow use of NWP 29 for housing developments as well as single family residences, and at the same time the Corps proposes to remove the requirement that the discharge is part of a single and complete project. Removing the single and complete requirement creates the potential for additional losses of waters associated with subsequent construction on individual parcels. DNR should further condition NWP 29 to allow for discharges for single and complete projects, only.

Discussion: The Corps added a new general condition (GC 28 Single and Complete Project) to the final published NWPs in the March 12, 2007 Federal Register. This condition clarifies that the NWPs authorize only single and complete projects. This is in response to concerns about removing the language from the 2002 NWPs that limited the use of certain NWPs to a single and complete project. That language was in NWPs 13, 15, 18, 19, 29, 39, 42, 43, and 44.

Limiting all NWPs to authorized only single and complete projects is a long-standing practice. In this new general condition, the authorized activity must be a single and complete project. In addition, this general condition states that the same NWP can be used only once to authorize that single and complete project. For example, NWP 39 cannot be used twice to authorize a

commercial development. This general condition is consistent with general condition 24, Use of Multiple Nationwide Permits. The new general condition will help improve environmental protection by clarifying that piecemealing of activities that require Department of Army permits is prohibited. Rock Island District uses geographic information system mapping software to track projects to limit the chance of piecemealing.

Comment 8: Proposed Regional Condition 7 applies to new NWP B, authorizing discharges into ditches and canals. DNR essentially proposes to deny certification to those discharges that would sever the jurisdiction of an upstream water of the U.S. from a downstream water of the U.S. We are concerned that activities eligible for NWP B have the potential to cause significant downstream water quality impacts, even if the jurisdiction is not fully severed. We urge DNR to deny certification to NWP B and reserve the state's ability to review all of these projects for their water quality impacts, to require conditions, to pursue alternatives and/or to deny the certification altogether.

Discussion: In the March 12, 2007 Federal Register, NWP B was renamed NWP 46 and was revised to only allow for discharges in ditches. Rock Island District revised regional condition 7 to remove the words "and canals" to be consistent with NWP 46. Specific criteria must be met to use this NWP. That criterion limits the use of this NWP to those ditches that generally provide few aquatic resource functions. It does not authorize discharges of dredged or fill material into streams. Pre-construction notification is required for all activities covered by this NWP. The need for compensatory mitigation to ensure minimal individual and cumulative adverse effects will be made by the district engineer on a case-by-case basis, in response to pre-construction notifications. The Corps believes that the provisions of general conditions 27 and 20 will allow the district engineer to determine if any compensatory mitigation is needed to reduce the effects of the activities authorized under this NWP to the minimal level.

Comment 9: Also, as discussed above, DNR's proposed water quality certification conditions only partially address the expanded scope of activities authorized by the new NWPs. Of major concern is the fact that the Corps proposes to allow District Engineer discretion to waive the 300 linear foot limit on impacts to intermittent and ephemeral streams under several of the NWPs. Intermittent and ephemeral reaches of streams perform very important water quality improvement, flood attenuation and habitat functions, and impacts to these resources should continue to be subject to limits. We urge DNR to limit impacts to ½ acre and a maximum of 300 linear feet for all streams as a condition for NWPs A, 27, 29, 39, and 42.

Discussion: Based on this comment, the DNR has added a state water quality condition that states "An individual Section 401 Water Quality Certification will be required for nationwide permits where the Corps' district engineer has issued a waiver to allow the permittee to exceed the limits of the nationwide permit." This will allow the DNR to review the project and ensure the project will not violate Iowa water quality standards.

Comment 10: Furthermore, the Corps has proposed to eliminate the restriction on the use of NWP's 39, 40, 42, 43 and 44 in the 100-year floodplain. Our organization has expressed strong disapproval of that proposal, as irresponsible and dangerous. In the event that the Corps fails to restore the floodplain restriction to those NWP's, we urge DNR to adopt a condition restricting the use of NWP's 39 and 42, as well as 29, in the 100-year floodplain. Elsewhere in these comments we urge DNR to deny certification to NWP's 40, 43 and 44. If DNR determines not to deny certification for these NWP's altogether, we urge that they be subject to the floodplain restriction, as well.

Discussion: The Corps and DNR have a shared application form that the applicant fills out once, makes copies and sends to the Corps and to DNR flood plains and sovereign lands sections. Therefore, every project the Corps reviews is also being reviewed concurrently by the DNR. If the DNR flood plains section denies a project, the Corps will deny the project without prejudice.

Jane Clark, Iowa Chapter Sierra Club

Comment 1: Jane Clark wants the DNR to provide protection for fens, seeps, bogs, sedge meadows and other rare wetlands. Missouri has a regional condition protecting these wetlands. Jane Clark has asked that Iowa adopt Missouri's regional condition. After a discussion with Ms. Donna Jones, Corps of Engineers, she felt the best protection for these wetlands would be to add a condition stating "An individual Section 401 Water Quality Certification is required for any activity impacting fens, seeps, and sedge meadows." The DNR will also provide a list of known fens, seeps, and sedge meadows to the Corps to be included on the Special Waters of Iowa list. The Corps contacts the DNR for comments (prior to issuing a NWP) whenever a project is proposed which will impact any water body on the Special Waters list.

Discussion: We agree with this comment and have added a water quality condition stating "An individual Section 401 Water Quality Certification will be required for projects that impact fens, bogs, seeps, or sedge meadows." We have also added any known fens, seeps, bogs and sedge meadows to the special waters list.

Comment 2: She also asked that we protect these wetlands when issuing regional permits. Regional Permit 33 states that "Fills that will adversely impact fens or sedge meadows will not be covered." Regional Permit 34 does not contain that same statement. I asked Mr. Neal Johnson, Corps project manager, if he knew why this statement was not included in Regional Permit 34. Both Mr. Johnson and I thought that the fen and sedge meadow condition was in both Regional Permits 33 and 34. We feel that the sentence must have accidentally been deleted from

the text. Therefore, the DNR will condition the Section 401 Water Quality Certification with the condition that “Fills that will adversely impact fens or sedge meadows will not be covered.”

Discussion: We agree and all projects, whether authorized by nationwide permit or regional permit, will have to obtain an individual Section 401 Water Quality Certification if they impact these special types of wetland.

Susan Heathcote, Iowa Environmental Council

Provided oral comments at the December 26, 2006 public hearing held.

Comment 1: First on the regional conditions within Iowa, I’d like to see us add an eighth regional condition that would prohibit general permits on areas that would impact sedge meadows, fens, bogs, and other sensitive wetland areas similar to the regional condition that is already on the list for Missouri. And also as extra protection on that, it would be a good idea to add those (that we know of) sedge meadows, fens, etc. to Iowa’s Special Waters list so that they would get flagged, if for some reason, there is a general permit that would affect those.

Discussion: We agree, please see the response to Jane Clark’s second comment.

Comment 2: Also, I would like to support the Regional Permit 34. I’m glad to see that because we’ve been concerned that the slow process of getting those wetlands built. We’re hoping that the streamlining permit process is going to help get more of those CREP wetlands built faster without again that we’re still catching those sensitive areas in the individual permit process but majority can go through the general permits.

Discussion: We’re glad that the Iowa Environmental Council supports Regional Permit 34. The Corps and Farm Services Agency put a great deal of effort into creating that regional permit.

Summary

All comments received encourage the DNR to work with the Corps to provide the highest level of protection for Iowa' water bodies, especially for fens, bogs, seeps, and sedge meadow wetlands. The ability of the Corps' district engineer to be able to waive the limits of some of the nationwide permits was disconcerting for one commenter who requested the DNR provide additional review of projects where the Corps has decided to waive the NWP limits.

In response to comments received, the DNR is conditioning the Section 401 issued to the Corps for the nationwide and regional permits. Individual Section 401 water quality certification will be required for projects which impact fens, seeps, bogs, sedge meadows, or when the Corps uses its waiver provision to issue a nationwide permit versus making the project obtain an individual permit and associated Section 401 water quality certificate.

These two Iowa water quality conditions will help provide additional review of projects that may impact rare wetlands which are difficult, possibly impossible, to replicate. They also allow the DNR to decide if the nationwide permit limits waived by the Corps only have minimal impacts on Iowa's water bodies and do not violate Iowa's water quality standards.



IOWA CHAPTER

3839 Merle Hay Road, Suite 280, Des Moines, IA 50310

January 9, 2007

Ms. Christine Schwake
Iowa Department of Natural Resources
502 E. 9th St.
Des Moines, Iowa 50319

Dear Ms. Schwake:

Please accept the following comments by the Sierra Club Iowa Chapter in response to the notice issued by the Iowa Department of Natural Resources regarding state water quality certification review of the U.S. Army Corps of Engineers issuance of the 2007 Nationwide Permits, under Section 401 of the Clean Water Act:

The Department is seeking comment on proposed regional conditions based on the draft, not the finalized Nationwide Permits. The state should base its water quality certification review on the finalized NWP's, since the permit limits and general conditions in those finalized NWP's will be determinant of their effect on Iowa's waters. And the public should be afforded the opportunity to comment on conditions prepared on that basis.

The Department proposes to certify all of the NWP's proposed by the Corps, subject to seven proposed regional conditions. We believe that the following NWP's would authorize activities that could result in significant destruction of waters of Iowa: NWP's 23, 40, 43, 44, B, E and F. These NWP's should not be certified, even with state-applied conditions limiting their use. Instead, the state should deny certification to these permits, and prepare to review applications under these NWP's on an individual basis. These NWP's will be discussed further, below.

The 2007 NWP's, as proposed, are substantially less protective of aquatic resources in numerous ways than those currently in effect. Further conditioning of the NWP's is needed just to ensure the same degree of water quality protection for Iowa's water. It is important for Iowa to determine the extent to which activities authorized by the expanded NWP's will continue to require individual state water quality review.

Specific comments:

1. Proposed State Regional Condition 1 would limit side slopes of newly constructed channels to a gradient no steeper than 2:1 and require that the slopes be planted in permanent, perennial, and native vegetation if not armored. Hard engineering techniques should, in fact, be discouraged altogether, rather than preferred. Streambank armoring has been shown to be associated with various negative effects on streams, including increasing stream velocity,

degradation of the stream channel, loss of the ability of riparian areas to revegetate, loss of spawning habitat, and accelerated erosion downstream. Streambank stabilization should rely on bioengineering to the maximum extent possible, with specific limits on the extent to which rip rap may be used. Both New Jersey and New Hampshire have incorporated natural stream bank stabilization methods requirements into their regulations, which may serve as useful models for revising proposed Regional Condition 1.

2. Proposed Regional Condition 2 regarding the recording of mitigation should be strengthened to ensure that all mitigation projects have instruments for permanent protection that are documented and recorded.

3. Proposed Regional Condition 3 requiring that mitigation be scheduled in advance or concurrent with permitted impacts is appropriate and we fully support it.

4. Proposed Regional Condition 4, requiring compensatory mitigation to offset impact of more than 1/10 acres of waters of the U.S., is an important safeguard, discouraging unnecessary filling of aquatic resources and ensuring that those resources are replaced. DNR should specify that the compensatory mitigation must provide replacement that is at least as good in function and at least as large in area as wetland being lost .

5. Proposed Regional Condition 5 provides for establishment of riparian buffers for stream channels that are constructed through areas that are not naturally vegetated. This condition would help to compensate for the Corps' proposed removal of the requirement for buffering open waters that applies to several of the current NWP. We recommend that DNR expand this Regional Condition to require buffering of all open waters, not just newly constructed channels, for all the NWPs, but especially NWPs 29 and 39. In addition, the Condition should provide for long-term maintenance of the buffer. Too often trees or grasses and forbs are planted but do not survive.

6. Proposed Regional Condition 6 would limit the permanent loss of waters from activities associated with construction of single family residences under NWP 29 to ¼ acre. We are very concerned that the Corps has proposed to allow use of NWP 29 for housing developments as well as single family residences, and at the same time the Corps proposes to remove the requirement that the discharge is part of a single and complete project. Removing the single and complete requirement creates the potential for additional losses of waters associated with subsequent construction on individual parcels. DNR should further condition NWP 29 to allow for discharges for single and complete projects, only.

7. Proposed Regional Condition 7 applies to new NWP B, authorizing discharges into ditches and canals. DNR essentially proposes to deny certification to those discharges that would sever the jurisdiction of an upstream water of the U.S. from a downstream water of the U.S. We are concerned that activities eligible for NWP B have the potential to cause significant downstream water quality impacts, even if the jurisdiction is not fully severed. We urge DNR to deny certification to NWP B and reserve the state's ability to review all of these projects for their water quality impacts, to require conditions, to pursue alternatives and/or to deny the certification altogether.

Also, as discussed above, DNR's proposed water quality certification conditions only partially address the expanded scope of activities authorized by the new NWPs. Of major concern is the fact that the Corps proposes to allow District Engineer discretion to waive the 300 linear foot limit on impacts to intermittent and ephemeral streams under several of the NWPs. Intermittent and ephemeral reaches of streams perform very important water quality improvement, flood attenuation and habitat functions, and impacts to these resources should continue to be subject to limits. We urge DNR to limit impacts to ½ acre and a maximum of 300 linear feet for all streams as a condition for NWPs A, 27, 29, 39, and 42. Furthermore, the Corps has proposed to eliminate the restriction on the use of NWPs 39, 40, 42, 43 and 44 in the 100-year floodplain. Our organization has expressed strong disapproval of that proposal, as irresponsible and dangerous. In the event that the Corps fails to restore the floodplain restriction to those NWPs, we urge DNR to adopt a condition restricting the use of NWPs 39 and 42, as well as 29, in the 100-year floodplain. Elsewhere in these comments we urge DNR to deny certification to NWPs 40, 43 and 44. If DNR determines not to deny certification for these NWPs altogether, we urge that they be subject to the floodplain restriction, as well.

In addition, we urge DNR to deny water quality certification to the following NWPs: 23, 40, 43, 44, B and F. In our view, activities that may be authorized under these NWPs have the potential to result in significant water quality degradation in Iowa's waters. The effect of denying certification to these NWPs would be for the state to retain its ability to review projects proposed under these NWPs on a case-by-case basis, and determine if those projects could be modified to avoid or minimize impacts, if more effective compensatory mitigation were needed, or if the project would result in unacceptable water quality degradation and should be denied certification.

NWP 23 authorizes activities determined by other agencies to be exempt from NEPA, subject to the Chief of Engineers' consent. It is not possible for DNR to anticipate sufficiently the nature of the projects that would be authorized nor their potential water quality impacts. It is therefore not possible for DNR to effectively condition the use of NWP 23, and DNR should therefore deny certification altogether, and preserve its ability to review these projects one-by-one.

NWP 40, as proposed, would authorize a greatly expanded scope of activities from what is currently included in this NWP. The permit is no longer more narrowly aimed at activities improving agricultural production or construction of farm building pads. The Corps has proposed to remove those limits and also to allow construction of farm ponds in waters of the U.S. As broadened, NWP 40 could be used for activities associated with conversion of agricultural land to other purposes. DNR should deny certification to NWP 40 to preserve its opportunity to review these projects and their potential impacts on water quality on an individual basis. If DNR elects not to deny certification to NWP 40, the permit should be restricted in scope, as discussed above, to 300 linear feet or ½ acre.

NWP 43 would authorize construction of stormwater management facilities in wetlands, streams and other waters. Facilities capturing stormwater, that may be contaminated by road surface runoff and other pollution sources, should not be located in waters of the U.S. where other alternatives may be available. We strongly urge DNR to deny certification for this NWP. Iowa

should ensure that no wetlands, streams and other aquatic resources are unnecessarily harmed or destroyed by construction of stormwater management facilities that could be located in an upland area. It is important for the state to preserve its ability to ensure that this occurs, by denying certification for this NWP.

Instream sand and gravel mining activities, authorized by NWP 44, have the well-documented potential to result in channel instability and sedimentation. DNR should preserve its ability to review stream mining projects on an individual basis. Barring that, the state should condition this permit to limit impacts to 300 linear feet on all streams.

NWPs E and F, authorizing discharges associated with coal remining and underground mining, respectively, should not be granted water quality certification. These permits authorize activities including construction of impoundments for mined waste and other treatment facilities for waste and acid mine drainage, all of which have the potential to result in significant water quality degradation. DNR should deny water quality certification for these NWPs and ensure that it retains the ability to review activities proposed under these NWPs on a case-by-case basis.

Regional Permits 33 and 34 should provide for specific protection for fens, sedge meadows, bogs, seeps and other special waters as designated by the State of Iowa. There is already proposed language related to permits 33 and 34 that “if a project is on a stream listed on the Special Waters of Iowa list, coordination with the IDNR must occur and appropriate measures deemed necessary to protect the integrity of Special Waters must be included in the project plans before authorization under the regional permit is issued.” This requirement should apply to all of the wetland types described above, in addition to the Special Waters.

The main point we have tried to make in these comments is that IDNR should not simply approve projects because they may satisfy the terms of the Corps of Engineers permits. IDNR must review each project on a case-by-case basis to ensure that Iowa’s water quality, especially its endangered wetland resources, is protected.

Thank you for considering these comments.

Very truly yours,

Wallace L. Taylor
Legal Chair
Sierra Club Iowa Chapter

Ms. Christine Schwake
Iowa Department of Natural Resources
502 E. 9th St.
Des Moines, Iowa 50319

Chris--when Susan Heathcote and I met with the DNR on December 26, we noticed that Regional Permit 33 has a note under "II Technical Criteria and Specifications (page 7) that "Fills that will adversely impact fens or sedge meadows will not be covered under this Regional Permit." Also in that section, "If a project is on a stream listed on the Special Waters of Iowa list, coordination with the IDNR must occur and appropriate measures deemed necessary to protect the integrity of Special Waters must be included in the project plans before authorization under the regional permit is issued."

"Generally, Regional Permitt 33 is for the placement of fill materials in waters of the U.S. in Iowa for the construction of small ponds, dams and grade stablization structures either planned by and/or funded by the NRCS, or in cooperation with other local, state, or federal agencies where NRCS is the lead Federal agency."

However, in Regional Permit 34, this section: "If a project is on a stream listed on the Special Waters of Iowa list, coordination with the IDNR must occur and appropriate measures deemed necessary to protect the integrity of Special Waters must be included in the project plans before authorization under the regional permit is issued" *IS* included,

However, the important section about "Fills that will adversely impact fens or sedge meadows will not be covered" (under Regional Permit 34) *is NOT* included.

This is especially of concern because Regional Permit 34 covers the Conservation Reserve Enhancement Program Structures in the State of Iowa where the Department of Agriculture's Farm Service Agency (FAS) is the lead agency. This program covers a very large portion of the state--the Prairie Pothole Region and even counties beyond that. The Prairie Pothole Region is an area where fens, seeps and sedge meadows would be likely to be found. I don't know if this was an intentional or unintentional oversight, but it's an important one. This omission is on page 6, the Addendum for Regional Permit 34.

The Iowa DNR currently provides the Corps with their list of "Special Waters".

We request that IDNR include fens, seeps, bogs, sedge meadows, etc. in their list of "Special Waters" to be reviewed. IDNR already has listings of fens in records. At the very least, the same protection should be provided in Regional Permit 34 as in Regional Permit 33.

Thank you for the opportunity to comment. Please consider these comments for the record in addition to those submitted for Sierra Club Iowa Chapter by Wally Taylor.

Sincerely,

Jane R. Clark
Conservation Co-Chair
Sierra Club, Iowa Chapter
9871 Lincoln Avenue
Des Moines, IA 50325

Oral Comments made at the December 26, 2006 Public Hearing at the Wallace
State Office Building

Susan Heathcote, Iowa Environmental Council

Susan Heathcote. I'm representing Iowa Environmental Council and I just have a few comments:

First on the regional conditions within Iowa, I'd like to see us add an eighth regional condition that would prohibit general permits on areas that would impact sedge meadows, fens, bogs, and other sensitive wetland areas similar to the regional condition that is already on the list for Missouri. And also as extra protection on that, it would be a good idea to add those (that we know of) sedge meadows, fens, etc. to Iowa's Special Waters list so that they would get flagged, if for some reason, there is a general permit that would affect those.

Also, I would like to support the Regional Permit 34. I'm glad to see that because we've been concerned that the slow process of getting those wetlands built. We're hoping that the streamlining permit process is going to help get more of those CREP wetlands built faster without again that we're still catching those sensitive areas in the individual permit process but majority can go through the general permits.

Thanks